

REMARKS / ARGUMENTS

This Amendment is submitted in full response to the outstanding Office Action dated September 15, 2003, wherein all of the currently pending claims were either objected to because of informalities or rejected on statutory grounds based on a newly cited reference, namely, U.S. Pat. No. 5,900,801 to Heagle et al. The Applicant remains appreciative of the Examiner's conscientious review of this application, including the withdrawal of prior objections to the drawings and rejections of claims, and respectfully asks for renewed reconsideration of this matter, including the amended claims presented herein, in light of the following remarks.

In the Office Action issued on September 15, 2003, claims 49, 53 and 54 were objected to based on minor language inconsistencies, and claims 46 and 47 were rejected under 35 U.S.C. 112, second paragraph as being dependent on a cancelled claim. Claims 37-39, 42-48, 53 and 54 stand rejected under 35 U.S.C. Section 102 as being anticipated by Heagle et al. (U.S. Pat. No. 5,900,801) and claims 2-4, 8-9, 12-17, 21-22, 24-27, 30-32, 34-35, and 49-52 stand rejected under 35 U.S.C. 103(a) as being unpatentable over the cited Heagle reference. Each of these objections and/or rejections will be addressed separately, below.

I. Resolution of Informalities and Section 112 Issues.

As noted above, claims 49, 53 and 54 were objected to as containing some language inconsistencies, and claims 46 and 47 were

rejected under 35 U.S.C. 112, second paragraph, because they were dependent upon a cancelled claim. These claims have been amended herein so as to overcome the noted inconsistencies. Therefore, it is now believed that both the objections to claims 49, 53-54 and the rejection of claims 46-47 have been overcome.

II. Section 102 Issues are Now Moot.

As noted above, independent claim 53 and claims 37-39, 42-48 and 54, which depend directly or indirectly therefrom, all stand rejected under 35 U.S.C. 102, based on the cited U.S. patent to Heagle et al. In response, however, independent claim 53 has been amended to reflect that the Applicant's inventive process for monitoring a food service site, as claimed, includes the step of communicating a *plurality of corrective actions to the user* in response to entry of user responses indicative of existing conditions being non-compliant with the plurality of standards. This additional claim limitation now recited in claim 53 is not taught anywhere, nor disclosed or even hinted at in the cited reference, nor it is believed, in any of the references of record. As such, this claim, along with those which depend from it, as amended, are now believed to clearly distinguish over the cited Heagle et al. reference such that the rejection of claims under 35 U.S.C. 102 have been overcome.

III. Section 103 Issues.

A. Legal Framework.

Before addressing the substantive issues involved with the rejection of claims under 35 U.S.C. §103, the Applicant respectfully mentions again the procedural requirement that the U.S. Patent and Trademark Office ("PTO") meet its burden of establishing a prima facie case of obviousness. With regard to Section 103 of the statute, decisions of the Federal Circuit specifically instruct that:

In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art [and further that] the mere fact that the prior art **may** be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modifications. In re Fritch, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992). (emphasis added)

Other relevant decisions of the Federal Circuit have stated:

"... virtually all [inventions] are combinations of old elements." *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 698, 218 USPQ 865 870 (Fed. Cir.) 1983) ... **Therefore, an examiner may often find every element of a claimed invention in the prior art. If identification of each claimed element in the prior art were sufficient to negate patentability, very few patents would ever issue.** Furthermore, rejecting patents solely by finding prior art corollaries for the claimed elements would permit an examiner to use the claimed invention itself as a blueprint for piecing together elements in the prior art to defeat patentability of the claimed invention. Such an approach would be "an illogical and inappropriate process by which to determine patentability." *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1570, 38 USPQ2d 1551, 1554 (Fed. Cir. 1996). (emphasis added)

"To prevent the use of hindsight ... to defeat patentability of the invention, this Court requires the Examiner show a motivation to combine the references that create the case of obviousness. In other words, the Examiner must show reasons that the skilled artisan, confronted with the same problems as

the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed. In re: Rouffett, 47 USPO 2d 1453, 1455 (CAC 1998).

With this legal framework still in mind, the Applicant will now turn to addressing the invention, as recited in the claims presented herein.

B. Applicant's Claimed Invention Contrasted with Heagle et al.

As noted above, independent claims 24 and 49, along with their respective dependent claims, stand rejected under 35 U.S.C. Section 103 based on the cited U.S. patent to Heagle et al. Applicant respectfully submits, however, that when the Heagle et al. patent is carefully considered, it does not at all teach, disclose or suggest the Applicant's invention as recited in these claims. To aid in reaching this conclusion, Applicant provides the following comments which demonstrate the patentability of these claims, despite the cited Heagle et al. reference, and the Examiner's careful consideration of these claims and comments is respectfully requested.

The cited Heagle et al. reference will be addressed first. It is noted that the invention taught in Heagle et al. is relevant as it teaches a universal system for monitoring and controlling food service requirements for safety and performance compliance. However, a thorough review of Heagle et al. clearly indicates that the disclosure set forth therein does not at all anticipate the Applicant's invention, as now recited in the claims, nor does it render same obvious within the meaning of Section 103.

As a first important difference, Heagle et al. does not contemplate, and in truth, does not even suggest a portable processor assembly as recited in Applicant's claims. In stark contrast, Heagle et al. calls for a stationary and centralized "Main CPU" as designated by reference numeral 50 and shown in Figure 3 (also referred to as Universal Control Center in Figure 1), and a number of work station monitors (WSM), shown as 51 in Figure 3. The WSMs communicate with the CPU because they are connected via hard-wiring (column 10, lines 25-29) to the network, and by virtue of an Interface Unit (60 in Figure 3). The primary purpose of Heagle et al.'s CPU is to continuously poll and monitor the basic network devices maintained in various remote locations being monitored (column 10, lines 1-7). As further described, Heagle et al.'s CPU identifies an "upset condition" primarily through results obtained by the pre-installed on-line monitoring devices at any one or more of the remote locations. Equally important, Heagle et al. teaches at column 10, lines 50-54 that *it is the CPU which processes data and determines if any corrective action is required*, and moreover, in that case, it is also the CPU which notifies the appropriate employee, work station or other entity by a coded alert signal (another important feature, discussed more below in further detail). Further description along these lines are found in Heagle et al. at column 8, lines 30-40 wherein it is stated that a unique numeric code is assigned to:

"... each activity that is monitored so the CPU (Central Processing Unit) can recognize and process the information it receives from the various network devices. Whenever more data

sampling is needed, or an upset condition is detected, requiring operator action to help maintain the proper performance characteristics ... that person and/or work station is **alerted and prompted by the CPU** to act accordingly.

In short, the Heagle et al. device utterly lacks a portable processor assembly, as recited in the Applicant's claimed invention. In fact, and as demonstrated above, Heagle et al. actually teaches away from the Applicant's invention, which calls for a portable processor assembly operable at one of a plurality of remote locations, and specifically wherein the portable processor includes a monitoring program determinative of compliant operational performance of the remote location(s). Further, the monitoring program embodied in the Applicant's portable processor assembly includes a plurality of specialized applications, including a task application, corrective application, alert application, etc. as recited in the claims.

The foregoing differences between the invention taught in Heagle et al. and that recited in Applicant's claims only become more clear when the following points are considered: the ability to communicate, among other things, corrective actions to be taken by a user of Applicant's inventive system on a **true "real time" basis**. For example, Applicant's invention as recited in claim 49, as amended, calls for interactive test items to be displayed on the portable processor assembly and which require user responses, with further, a plurality of corrective action(s) being evident on the display in response to a user response which is non-compliant with pre-determined standards, and importantly, wherein the user is

required to enter substantially concurrently a supplemental response to the corrective action(s) displayed on the portable processor assembly. As claimed then, the Applicant's invention is both truly portable and also ensures that monitoring of the food service site occurs on a true "real time" basis, i.e., without any delay as set forth in Heagle et al. due to time lags in monitoring activity by the stationary, centralized Main CPU 50 or due to transmissions between the Main CPU 50 and a separately located Work Station Monitor (WSM), and potentially, a pager or other wireless device. Simply put, even if it is *assumed arguendo*, that the invention taught in Heagle et al. were to function without any technical glitches, then any corrective action called for by the CPU would consistently be taken at a *later time*. There are even more compelling reasons, expressed below, which support this fundamental difference between Heagle et al. invention and Applicant's invention, as claimed. In short, however, Heagle et al.'s reliance on a stationary, centralized Main CPU 50 to accomplish continuous monitoring or polling of the various devices contained within the monitoring network teaches away from Applicant's invention which calls for the use of a portable processor assembly having no reliance on a central processing unit and further wherein the portable processor assembly is "driven" or operator interactive by requiring real time, functional participation of authorized personnel at each of the remote sites.

Before turning to the other reasons which support this fundamental difference between Heagle et al. and the Applicant's

invention, the Applicant would like to briefly address the case of In re Lindberg as cited at page 10 of the PTO's Office Action. While the Applicant agrees in general with the proposition that the making of an old device portable or movable is not sufficient to support patentability, it is only once the following wording appearing therein is considered: "**without producing any new and unexpected results.**" In this case, the Applicant's claimed invention is distinguishable because, due at least in part to the use of a portable processor assembly, it does accomplish new and unexpected results, and results which are not obtainable by Heagle et al. These include but are not limited to interaction with an operator to perform the described monitoring and corrective actions on a true real time basis, with the inclusion of the monitoring program directly in the portable processor assembly enabling the real time functionality of Applicant's system.

As a second important difference, *even if it could* be argued that Heagle et al. reference contemplates a portable processor assembly (which it does not), Heagle et al. certainly does not call for any corrective action(s) to be readily displayed on the portable processor assembly once a system upset has been detected, as called for in Applicant's invention. On the contrary, it appears that the Heagle et al. invention is utterly incapable of meeting the claimed recitations for Applicant's invention because it specifically teaches *a more complicated process*, as is evident from Column 6, lines 64-67 carrying over to Column 7:

"The CPU software ... incorporates a history of appropriate operator actions (normal or remedial) to be taken whenever a system alert signal is received; **each situation is assigned to a unique code number or other identifier displayed on the pagers and/or work station monitors (WSM).** Code books provided with the pagers and decoding charts posted at the work station may be used, e.g., when code numbers are used, to describe in-depth and/or to provide a simplified check list for the appropriate actions that should be taken to respond to each alert prompt received." (Emphasis added).

In other words, a user of the Heagle et al. system must go through a series of translations, using a code book that may even involve an additional step of traveling to a separate location or WSM. There are several instances in the text of the Heagle et al. patent where reference is made to the "coded alert signal" or the "coded entry," although at column 11, lines 63-67 it is clearly stated:

"Code books and charts explaining each specific element code are necessary for the network to perform properly. They may advise the employee of the overall purposes of the system, specific tasks for a given assignment and what action should be taken next. (Emphasis added).

This aspect of the cited reference to Heagle et al. should now make it abundantly clear that it does not at all anticipate, nor even come close to suggesting the Applicant's invention, as claimed. One reason, alone, relates to the ability of the Applicant's system to significantly avoid, if not eliminate, the delay inherent in the Heagle et al. system by indicating to an operator encountering conditions within a food service site that are non-compliant with certain standard(s), on an interactive basis and on a true real time basis, what corrective actions should be taken. As set forth in the specification, it should be appreciated that there is a need

in the art for this type of improvement because the taking of such corrective action(s) promptly and without delay may, for example, well determine whether patrons of the food service site might be exposed to excessive bacterial levels, etc., which in turn, may cause one or more of them to become ill.

In light of the foregoing arguments and claim amendments, the Applicant respectfully urges the Examiner to withdraw the rejection of claims based on the Heagle et al. reference and to issuance an allowance of same.

IV. Claims 31-32 of System Allow for Owner Derived Standards.

Finally, the PTO's assertion "... that it would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to adapt Heagle to allow restaurant operators to set predetermined standards comprising owner derived temperature standards which exceed government regulatory standards ..." is duly noted. However, Applicant respectfully disagrees with this assertion as there is no express teaching nor even a suggestion in Heagle et al., or presumably in the prior art in general, to make the modifications recited in claims 31-32, i.e., of allowing the system to monitor owner derived temperature standards in addition to the government derived standards. See In re Fritch, supra. As such, it is respectfully asserted that the PTO has clearly not met its burden of establishing a prima facie case of obviousness with respect to these claims. The rejection of these claims is, therefore, improper based on the current record as there is no

evidence to support the PTO's assertion.

V. Conclusion.

This application has been amended to ensure that the claims now clearly recite patentable subject matter which is distinguishable from cited Heagle at al. reference, whether considered under Section 102 or 103 of the statute.

Accordingly, based on the amended and new claims presented herein, as well as on the above Remarks and the contents of the references of record, the Examiner is respectfully requested to reconsider her position. Since nowhere in the art is this new, novel and not obvious combination to be found, taught, or even suggested, it is urged that this case is now in condition for allowance, which favorable action is respectfully solicited.

Finally, a Request for an appropriate Extension of Time is enclosed herewith along with the corresponding PTO fee. In the event that any filing fee may be required by the filing of this paper, the Assistant Commissioner is hereby authorized to charge any fees and/or credit to our **Deposit Account No. 13-1227**.

In addition to the above, and in accordance with 37 C.F.R. 1.121, attached hereto is a marked-up version of the changes made to the specification and claims by the current Amendment, which is captioned "Version with Markings to Show Changes Made."

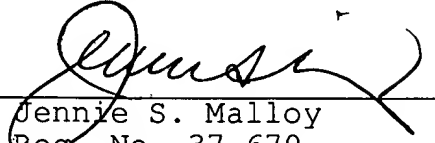
Application No. 09/826,428
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